

From Warsaw with Love

Maximilian Steinbeis

2020-11-27T23:39:47

To open the *Frankfurter Allgemeine* first thing in the morning is what a good German lawyer can be relied upon to do, which is obviously also known in Warsaw: In today's issue there is an [op-ed](#) by the Minister of Foreign Affairs of the Republic of Poland, Zbigniew Rau, which warmly appeals for the friendship and affection of the juristic part of the FAZ readership. "I have great respect for the German legal tradition, which is connected with the concept of *Rechtsstaat* and has influenced the European understanding of the principle of legality," flatters His Excellency and reassures us that Poland is doing basically the same thing as the Federal Constitutional Court when it "defends the principle of legalism, which is important for everyone in Europe," against the "legal presumption" of the EU which seeks to extend its powers at the expense of the masters of the Treaties.

It is the church organ sound of German constitutional orthodoxy that the PiS minister is striving to intone with his article under the title "The EU treaties are sacred": *Kompetenz-Kompetenz*, and all that. Obviously he hopes to make some allies here. This is interesting less as an argument than as an indication of what strategy the Polish government in close coordination with the Hungarian government will pursue after its much-fanfares veto has crumbled away at the Council meeting the week after next.

What has happened? The current governments of Hungary and Poland quite rightly foresee that the planned rule-of-law mechanism agreed upon by the German Council Presidency and the EU Parliament at the beginning of November might be costly for them. Tampering with judicial independence, not implementing judgments and other violations of the principle of the rule of law would in future mean that the Commission, with the qualified approval of the Council, would be able to cut their transfer funds if "breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the principles of sound financial management of the EU budget or the protection of the financial interests of the Union in a sufficiently direct way". Hungary and Poland cannot stop this regulation alone, because it only requires a qualified majority in the Council. Therefore they simply grab another project that has to be unanimously adopted, namely the EU financial framework and the Covid-19 recovery program NextGenerationEU, and just [block that instead](#).

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This bluff will hardly work as long as the other member states keep their nerves, as [Manuel Müller](#) summarized very well last week. The Polish Foreign Minister's op-ed seems to me to indicate a different strategy for fending off the new sanctions mechanism – with legal means. His core argument is this: When it comes to the protection of the rule of law and the other fundamental values of Article 2 TEU, the treaties already provide for a sanction mechanism, namely the notorious Article 7

– that is, the notoriously use- and hopeless two-tier procedure in which evil-doers can ultimately be sanctioned only by unanimous vote in the Council. In 2011, no-one was prepared to use this against Hungary, and when in 2016 Poland joined them, it was too late: Now there were two of them, each ready to veto away any Article 7 danger for the other. Which, according to the Polish foreign minister, is precisely the great virtue of this procedure: it is “objective, because it must take into account the opinions of everyone”, including the partners in crime! The new procedure, however, tries to circumvent this and is therefore to be considered “a gross violation of the treaties and the rule of law”.

The argument that Article 7 precludes any other mechanism for the protection of the rule of law in the EU was in fact, as the op-ed mentions, already put forward by the Council's Legal Service two years ago. The indomitable Laurent Pech has just forced the publication of this document ([here](#)). Pech, Kim Scheppele and Dan Kelemen have [made a compelling point](#) showing why this argument is legally unconvincing. The position of the Council's lawyers also seems difficult to reconcile with the case law of the European Court of Justice of recent years with respect to judicial independence in the member states. Moreover, the text of the regulation has changed since then. The Legal Service expressly recognizes that there may of course be conditionalities for EU transfer funds as long as it's really a conditionality with a clear link to the EU budget and not a general sanction for rule of law deficits. The [current version of the draft](#) explicitly mentions that a “sufficiently direct” link is required.

Poland will probably take legal action against the regulation before the ECJ as soon as it enters into force. It is their right to do so, and indeed it may not be a bad idea to clarify the question of the relationship of Article 7 to other sanction options. What seems highly questionable to me, however, is whether Poland would accept such a clarification if it turns out to be not to the PiS government's liking. This, I'm inclined to think, is the true reason why the Polish Foreign Minister is so enraptured with the Federal Constitutional Court and its defense of “legalism”: He is grateful for its service, with the *Weiss* judgment, in providing a blueprint for declaring a defeat to be ultra vires and irrelevant. If this is what they intend to do in the end, the rule of law in the Union will soon be in a much worse shape than many well-meaning FAZ-reading German lawyers with all their pride of the Bundesverfassungsgericht and its merits for European constitutional culture may realize.

Thanks to Walther Michl for invaluable input

The week on Verfassungsblog

In fact, the [question](#) has already arisen in the political arena in Germany whether the **rule of law mechanism** might also be used against Germany if, for example, the Federal Constitutional Court were to pass an ultra vires verdict like *Weiss* again. [MATTHIAS RUFFERT](#) and [MALTE SYMANN](#) dispel these concerns and consider the planned mechanism a necessary and good thing.

Poland and Hungary have vetoed the EU's 750 trillion euro budget for the next five years in order to prevent the rule of law mechanism. In order to persuade the two countries to give in, the EU needs a credible Plan B. [SILVIA MERLER](#) and [FRANCESCO NICOLI](#) discuss three options for how the financial package could be passed even without Poland and Hungary. [FRANZ C. MAYER](#) examines whether an intergovernmental approach outside the EU legal framework, analogous to the euro crisis, would be feasible.

Judicial reforms that raise questions also exist in **Norway** and **Slovakia**. [PETER #UROS](#) and [HANS PETTER GRAVER](#) explain what this is all about and why we should pay more attention to both processes.

Three weeks ago the **Ethiopian** government launched a military offensive against the state of Tigray. A conflict between the national and local governments had escalated after the elections had to be postponed due to the Corona pandemic. [YONATAN FESSHA](#) explains the role of constitutional interpretation in the armed conflict from which more than 40,000 people have already fled.

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the Verfassungsblog team*

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On 21 November 1995 the **Bosnian** war came to an end under American leadership with the Dayton Peace Agreement. 25 years after, it is clear that the “Dayton System” is in urgent need of reform. Citizens’ dissatisfaction with widespread corruption and political stalemate in key institutions, exacerbated by poor management of the pandemic, was also recently evident in local elections, explains [LIDIA BONIFATI](#).

Austria is currently celebrating “100 years of federal constitutional law”. But a constitution is only worth as much as the lived constitutional culture, says [MARKUS BEHAM](#) and takes the anniversary as an opportunity for critical reflection.

The Austrian capital Vienna was the scene of a terrible terrorist attack. The traces had hardly been removed when the drafts for new **anti-terror packages** were already available. [TRISTAN BARCZAK](#) describes how the extraordinary is generalized while at the same time the normal is denormalized in security law, leading to bad and unconstitutional legislation.

In **France** last week, the Conseil d'État issued a ruling that for the first time examines France's obligation to reduce greenhouse gases. The ruling not only sets a precedent for France, but could also inspire other courts in Europe and the European Court of Justice to admit more climate protection cases, finds [NATHAN DE ARRIBA-SELLIER](#).

The German Federal Administrative Court sees no obligation of Germany to enforce international humanitarian law with regard to drone warfare on the US base **Ramstein** and gives priority to the foreign policy interests of the state over its duties under international law, to the chagrin of [SEBASTIAN RUNSCHKE](#).

[MARKUS LUDWIGS](#) examines the decision of the German Federal Constitutional Court on the compensation of **nuclear power** company Vattenfall for the phase-out of its plant and notes that this decision could have surprised no-one: The deficiencies had been clearly named and known for a long time.

It should go without saying: Racist opinions may have bad consequences for those who utter them, and no, that's not a violation of their freedom of expression. The German Federal Constitutional Court has stated this quite clearly, write [ANNIKA FISCHER-UEBLER](#) and [FELIX THRUN](#).

The Bavarian Administrative Court of Appeals finds that municipalities mustn't refuse the lease of event rooms just because the demands of the anti-Israel BDS movement may be discussed at an event. [LOTHAR ZECHLIN](#) explains why, according to the court, **anti-Semitism** can't be a criterion for exclusion.

How freely members of government can take part in the political battle of opinion has preoccupied the German courts repeatedly since 2014. On Tuesday, the State Constitutional Court of Lower Saxony now ruled on tweets by the state chief of government in which he had sharply criticized an assembly organized by the nazi party NPD. [FABIAN MICHL](#) analyzes the ruling which limits the duty of neutrality of members of government when it comes to protecting the free democratic basic order and its institutions.

[HANS MICHAEL HEINIG](#) binds together the many threads of the debate on the role of parliaments in the fight against the Covid-19 pandemic.

That's all for this week. Please don't forget to support us on [Steady](#), by Paypal (paypal@verfassungsblog.de) or bank transfer (IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF). Many thanks and all the best to you,

Max Steinbeis

